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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 20

DEAN RUSK, Secretary of State, *Appellant*

v.

JOSEPH HENRY CORT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the three-judge district court (R. 32-39) is reported at 187 F. Supp. 683.

JURISDICTION

The judgment of the district court, holding Section 349(a)(10) of the Immigration and Nationality Act of 1952, *infra*, pp. 2-3, unconstitutional, declaring that appellee is a citizen of the United States, and enjoining the Secretary of State from denying him a passport on the ground that he is not a citizen, was entered on October 25, 1960 (R. 40-41). Notice of appeal to this Court was filed in the district court on November 1,

1960 (R. 42-44). On February 20, 1961, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 49). 365 U. S. 808.

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction of this action for a declaratory judgment of United States nationality and injunctive relief brought by a person residing abroad who claims that he has been denied a right as a United States national, or whether the exclusive remedy in such a case is that provided by Section 360(b) and (c) of the Immigration and Nationality Act of 1952.

2. Whether Congress has the constitutional power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen who, in time of national emergency, remained outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

STATUTES INVOLVED

1. The Immigration and Nationality Act of 1952, 66 Stat. 163, provides in pertinent part:

SEC. 349(a)(10) [66 Stat. 267-268]:

> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> * * * * *
>
> (10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for

the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

SEC. 360 [66 Stat. 273-274]:

(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of

the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally ex-

cluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

2. Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171-1172, provided:

> If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he ap-

proves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided.

STATEMENT

On March 23, 1960, the appellee filed suit in the District Court for the District of Columbia against the Secretary of State seeking declaratory and injunctive relief overturning the State Department's denial of his application for an American passport on the ground that he had lost his citizenship, under Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3, by remaining outside the United States during a period of national emergency for the purpose of evading or avoiding service in the armed forces of the United States. In his complaint, appellee alleged, *inter alia*, that he had not remained abroad to avoid his military obligation, and that Section 349(a)(10) was unconstitutional (R. 1-6).

The Secretary of State, by motion to dismiss (R. 17) and in his amended answer (R. 23-26), asserted that the district court was without jurisdiction to entertain the declaratory judgment action because Section 360(b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3-5, provides the exclusive remedy for one residing abroad who claims a denial of citizenship rights, and also averred that the the complaint failed to raise a substantial constitutional question.

Both parties moved for summary judgment before the three-judge district court convened under 28 U.S.C. 2282 (R. 7, 27). On October 11, 1960, the district court granted appellee's motion for summary judgment (R.

32-39), holding (1) that the court had jurisdiction of the declaratory judgment suit (R. 34-35); (2) that the government had proved by clear, convincing, and unequivocal evidence that appellee had remained abroad to avoid his military obligation (R. 35-36); but (3) that, under the controlling force of *Trop* v. *Dulles*, 356 U.S. 86, Section 349(a)(10) was unconstitutional (R. 36-39).

The pertinent facts may be summarized as follows:

1. Appellee, a physician and research physiologist, was born in Boston, Massachusetts, in 1927. In May 1951 he left this country for England to accept a research fellowship at the University of Cambridge (R. 2, 8, 23, 29, 33, 103-104).[1] A few days before his departure, he had registered as a "special registrant" under the so-called Doctors' Draft Act (R. 2, 24, 104).[2] On September 11, 1952, he was classified 1-A (medical), available for military service (R. 104).

2. On December 29, 1952, appellee accepted a teaching position in the Physiology Department of the Harvard Medical School. In his letter of acceptance he indicated his intention to return to the United States in late June 1953, and his readiness to start work on August 1, 1953 (R. 131-132; see also January 7, 1953, letter to appellee from Professor E. M. Landis,

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[1] Appellee had been issued a United States passport on June 1, 1948, which was renewed on June 19, 1950, for two years (R. 2, 23, 110-112).

[2] Previously, on December 27, 1945, appellee had registered under the regular Selective Service Act with a Brookline, Massachusetts, draft board. On March 5, 1946, following a physical examination he was classified "4-F". On July 5, 1949, he registered with his draft board under the Universal Training and Service Act of 1948, and on September 20, 1949, was classified "3-A" (R. 103-104).

R. 133).[3] On the same date (December 29, 1952) that he transmitted his letter of acceptance, appellee wrote to the Massachusetts Medical Advisory Committee advising that, in July 1953, he would commence teaching at Harvard, and requested a draft deferment on the ground that this "civilian function * * * shall be far more essential to my country than military service" (R. 115-116). On January 29, 1953, the Harvard authorities advised the Massachusetts Medical Advisory Committee that they did not regard Dr. Cort's teaching position as "essential to civilian care needs or medical teaching" (R. 137), and on February 4, 1953, appellee's local board was informed of the Advisory Committee's recommendation that appellee "be considered available for active military service" (R. 117).

Meanwhile, on January 31, 1953, Doctor E. M. Landis of the Department of Physiology at Harvard, sent a letter to appellee informing him of the school authorities' decision that his teaching position was not essential and that he would probably be inducted upon his return to the United States; Dr. Landis suggested that the appellee consider applying for a commission as soon as possible, even while overseas (R. 138). Appellee answered on February 10, 1953, expressing sur-

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[3] Starting with November 28, 1951, the American Embassy in London had sought to have appellee surrender his passport and return to the United States. He did not accede to the Embassy's requests (R. 72-74). Appellee admittedly had been a member of the Communist Party in New Haven, Connecticut, from December 1946 until May 1951, with the exception of August 1948 to July 1949 (R. 69). In November 1951, the policy of the State Department was to deny passports to supporters of the world Communist movement, except for return to the United States. That policy, later embodied in the Passport Regulations (see 22 C.F.R. 51.137, 51.142 (1958)), was ultimately held to be unauthorized under existing statutes. See *Kent* v. *Dulles*, 357 U.S. 116.

prise at these developments. He said that he had assumed "that teaching positions would be essential", that he had heard nothing from his draft board, and that until he heard something definite he was "reluctant to take a decision that may prove to be foolish or premature" (R. 139). Dr. Landis wrote again to appellee, on March 6, 1953, pointing out that since the "services are so desparately in need of M.D.'s", it would be impossible to get him a teaching deferment, and noting that the only way for him to clarify his status was to apply for a commission. Dr. Landis stated that, if appellee was turned down for military service for medical reasons, the Harvard Dean's office could then reconsider his appointment (R. 140). The Harvard correspondence was terminated with a letter from appellee, dated May 29, 1953, indicating that he had heard from his draft board and that his application for employment would have to remain on file (R. 141).

3. On February 9, 1953, appellee's draft board had sent him notification that his request for deferment had been denied and a form ordering that, within 30 days of receipt, he report for a physical examination as a special registrant, either to his local draft board or to the commanding officer of the examining facility in Frankfurt, Germany (R. 118-119). On June 4, 1953, the local draft board sent appellee a notice directing that he report for physical examination at Brookline, Massachusetts, on July 1, 1953 (R. 121). On July 3, 1953, the draft board again sent appellee a notice ordering that he report for a physical examination at Frankfurt, Germany, within 30 days. In the accompanying letter, appellee was directed to notify the local board as to his course of action; otherwise, he was informed, he would "be immediately processed for

Induction" (R. 124-125). On August 13, 1953, the local draft board ordered appellee to report on September 14, 1953, for induction (R. 127, see also R. 126, 128, 129-130). Appellee has at all times conceded that he received these notices in 1953 and that he failed to report as directed (R. 2-3, 9, 54-55, 77, 90, 91-92, 94-95, 98, 104, 108-109).[4]

On December 17, 1954, an indictment was returned against appellee in the United States District Court for the District of Massachusetts, charging him with having failed to comply with the induction order of September 14, 1953 (R. 75). The indictment is still pending. On August 8, 1954, after the British Home Office refused to renew his residence permit, appellee took up residence in Czechoslovakia. He has remained there ever since (R. 3, 24, 33, 103).

4. On April 7, 1959, appellee made an application in Prague, Czechoslovakia, for a United States passport (R. 3, 20, 24, 57, 86-87). On October 16, 1959, the Department of State denied this application, finding that he had expatriated himself on September 14, 1953, under the provisions of Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3 (R. 103). Appellee took an appeal from this decision and was afforded a hearing before the State Department Passport Board of Review at which he was

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[4] In his district court complaint, appellee asserted that he did not appear for induction because he believed that the order was not issued in good faith to secure his presence for military service; that political associations and physical disabilities rendered him unfit for such service; and that he was being ordered to report back in order to be served with a Congressional subpoena, or subjected to other governmental sanction because of his political associations (R. 2-3; see also R. 9, 54-55, 77, 92, 94-95, 98, 105).

represented by counsel.[5] On December 8, 1959, the Board affirmed the finding of expatriation (R. 103-107). On February 8, 1960, the Board's decision was approved by the Legal Adviser of the State Department (R. 102). Appellee's counsel was informed of this adverse decision by letter dated February 10, 1960 (R. 100-101).

In this letter of notification to appellee's counsel, he was informed that, since appellee had exhausted his other remedies, "the Embassy at Prague and the Department are prepared to give prompt consideration to Dr. Cort's request for a certificate of identity upon his execution of a formal application therefor" so that he could avail himself of the remedies afforded by Section 360(b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3-5 (R. 100-101). No such application has ever been filed. Instead, as already noted *supra*, p. 6, appellee filed the instant suit against the Secretary of State seeking declaratory and injunctive relief.

Following the judgment of the three-judge district court, the government's application for a stay of its mandate was denied. Thereafter, on January 6, 1961, the American Embassy issued a passport to appellee limited for his return to the United States. As of this writing, appellee has not returned to the United States.

5. In the course of the administrative and judicial proceedings, appellee filed various affidavits in which he stated that he did not depart from this country, or remain abroad, for the purpose of avoiding his military obligations (R. 51-55, 60, 88-92, 94-95), but in order to

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[5] A transcript of this hearing is in the original record on file with the Clerk of this Court.

pursue his professional career or to avoid legislative investigations or possible criminal prosecution which he thought might follow upon his return to this country.

SUMMARY OF ARGUMENT

At the outset we point out, since the Court postponed the question of its jurisdiction, that the Court clearly has jurisdiction under 28 U.S.C. 1252, providing for a direct appeal from any decision of any court of the United States, in a government case, invalidating an Act of Congress. Here, the district court held Section 349(a)(10) of the Immigration and Nationality Act of 1952 unconstitutional, and appeal properly lies to this Court regardless of whether the court below had jurisdiction to proceed as it did.

I

A. The language and legislative history of Section 360(b) and (c) of the Immigration and Nationality Act of 1952, *supra*, pp. 3-5, together with the statute's historical antecedents, show that Congress intended those subsections to provide the exclusive remedy for testing citizenship claims of persons residing abroad and that the present declaratory action should have been dismissed.

1. a. Before the adoption of the Nationality Act of 1940, it was the judicial consensus that persons residing abroad claiming to be American citizens could test their citizenship claims in exclusion proceedings only. In those proceedings the administrative determination of the facts of the citizenship claim was conclusive if supported by substantial evidence. Judicial review, by *habeas corpus*, was strictly limited to the

question of the legality of the detention. *United States* v. *Ju Toy*, 198 U.S. 253, 263; *Ng Fung Ho* v. *White*, 259 U.S. 276, 282. And while the remedy available to a *resident* citizenship claimant was subsequently enlarged to include an action for declaratory relief under the Declaratory Judgment Act of 1934 (see *Perkins* v. *Elg*, 307 U.S. 325), no similar *de novo* relief was recognized as being available to the citizenship claimant who resided abroad.

b. The legislative history of the Nationality Act of 1940 shows that Congress understood the then existing law as we have just described it, and, since the Nationality Act of 1940 was "cutting off the claim to citizenship of * * * thousands of persons * * *" (86 Cong. Rec. 13247), decided to ameliorate the rigors of the existing law and adopt a new method by which non-resident citizenship claimants might have fuller judicial review. The result was Section 503, under the broad terms of which a citizenship claimant, whether here or abroad, was authorized to institute a declaratory judgment suit in the federal courts to have his citizenship claim determined *de novo* whenever his alleged rights of citizenship had been denied by the administrative authorities.

c. The liberality of Section 503, however, soon gave rise to unforeseen problems. The citizenship claims of non-residents, primarily based on self-serving oral assertions, often presented great difficulties for fair adjudication, because of differences in language and culture, as well as the fact that they usually involved events long past, which had occurred thousands of miles away. See *Ly Shew* v. *Acheson*, 110 F. Supp. 50, 54-55 (data collected) (N.D.Cal.), vacated and remanded *sub nom. Ly Shew* v. *Dulles*, 219 F. 2d 413 (C.A. 9). Con-

cern with the mushrooming dimensions of the problems created by these cases, and the opportunity Section 503 presented for fraudulent entry, prompted Congress, when it undertook a general review of immigration and nationality law (the results of which were later embodied in the 1952 Act), to introduce a new remedial procedure.

2. a. In 1950, the Senate Committee of the Judiciary recommended that the declaratory judgment remedy of Section 503 be limited to *resident* citizenship claimants only (S. Rept. No. 1515, 81st Cong., 2d Sess., p. 777), and this was the path staked out in the early legislative proposals (see *e.g.*, S. 3455, 81st Cong.; S. 716 and H.R. 2379, 82d Cong., 1st Sess). These early proposals soon met criticism on the ground that they provided no remedy at all for citizenship claimants residing abroad. To remedy this gap, the Deputy Attorney General recommended that the overseas claimants be required to go to a port of entry of the United States and test their claims within the framework of the exclusion procedures of the Immigration and Naturalization Service; under this method the claim could be properly screened, investigated, and determined by an expert agency. See Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., p. 711.

From these early differences of view, two different plans emerged. On the one hand, the House bill retained the declaratory judgment route, with certain safeguarding limitations, for citizenship claimants here and abroad. H. Rept. No. 1365, 82d Cong., 2d Sess., on H.R. 5678, p. 87. The Senate version, on the other

hand, rejected declaratory judgment relief for citizenship claimants abroad; instead—taking its lead from the Deputy Attorney General's proposal—it required that the nationality of a non-resident claimant be initially determined by the Immigration and Naturalization Service "in accordance with the normal immigration procedures" S. Rept. No. 1137, 82d Cong., 2d Sess., on S. 2550, p. 50. After joint consideration of these two divergent proposals, the Senate approach, with minor modifications, was adopted. See H. Conf. Rept. No. 2096, 82d Cong., 2d Sess., pp. 117-118, 127.

b. The net effect of the Congressional deliberation was legislation (Section 360(b) and (c)) which rejected both extremes—the broad scope of Section 503 which Congress believed to have been subject to easy misuse by fraudulent claimants, and the restrictive view of the proposals that there be no remedy at all for citizenship claimants residing abroad. Instead, Congress devised a procedure which would permit a preliminary sifting of the claims of non-residents, and a preliminary development of factual issues by administrative proceedings, before the contested issues, legal or factual, were determined by the courts.

Read against this careful Congressional study of the strengths and weaknesses of the alternatives, the procedure ultimately prescribed by Section 360(b) and (c) cannot fairly be regarded as the mere specification of one of several permissive avenues of relief. That the statute speaks permissively—using "may" rather than "shall"—indicates only that Congress meant that those citizenship claimants abroad who desire to test an administrative denial of citizenship rights may do so. As the legislative material makes

clear, Congress did not mean that they may do so either under the statute or by way of a declaratory judgment action. The history graphically points out that Congress knowingly and deliberately rejected the suggestion that overseas citizenship claimants be allowed to test out their claims directly in the courts without first coming to this country and attempting to establish their rights under the usual immigration procedures. The decision below, recognizing an alternative remedy under the Declaratory Judgment Act, contravenes the express Congressional mandate.

There is certainly a rational basis for requiring a non-resident's citizenship claim first to be determined under the procedures of the Immigration and Naturalization Service. Such claims often pose complex and difficult factual issues even where the loss of nationality stems from an act presumably easy to prove (see, *e.g., Nishikawa* v. *Dulles,* 356 U.S. 129), and the evidence-gathering and the evidence-sifting machinery of the Service is helpful in ascertaining the truth and defining the issues. The suggestion that the immigration procedures of Section 360(b) and (c) are repetitious and unnecessary since the claimant abroad, who has been denied a passport, has already utilized the State Department process overlooks the purpose of the statute. Foreign service officials abroad cannot, in the nature of their situation, conduct detailed and formal hearings of the type available at a United States port of entry, or gather or sift information and evidence. The agency decision abroad is simply the action which triggers the formalized procedures of Section 360(b) and (c)—it is the condition precedent to the administrative review procedure adopted by Congress, not its termination.

After a certificate of identity to travel to the United States has been obtained under subsection (b), the claimant is then required to present himself at the borders of this country and seek entry as a United States citizen. The exclusion proceedings which follow are formalized by statute and implemented by appropriate regulations. The net of these proceedings is that the issue of citizenship is investigated and weighed by authorities who, by virtue of experience, training, and facilities, are able to test and evaluate the factual validity of the claim, and gather the appropriate evidence. Such proceedings are, in short, geared to supply a reviewing court with a full record (including testimony by the claimant), appropriately sifted, containing the pertinent information bearing on the claim to citizenship.

B. It is plain that, if Congress did intend the procedures of Section 360(b) and (c) to be utilized before access to the courts would be available, it had the constitutional power so to provide. See, *e.g., Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51.

Since there has not as yet been an administrative adjudication of appellee's claim, and no effort by appellee to follow the procedures of Section 360(b) and (c), any question as to the scope and nature of the judicial review ultimately available to him is premature at this stage. While Congress has provided in Section 360(c) that the review of the administrative determination shall be in "habeas corpus proceedings and not otherwise", this settles the form, not necessarily the scope, of the judicial remedy. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 183, 186. Appellee has not even commenced the administrative procedure required by the statute, and therefore his declara-

tory action seeking a judicial determination should have been dismissed.

II

On the merits, the case comes to this Court with (a) the factual finding by the district court that the government has borne the burden of proving that appellee remained outside United States jurisdiction (in a time of emergency) for the purpose of evading and avoiding military service, and (b) the legal holding that Section 349(a)(10) of the Immigration and Nationality Act of 1952—the expatriation provision which governs appellee's case—is unconstitutional. In the respects pertinent here, Section 349(a)(10) is a continuation of, and the same as, Section 401(j) of the Nationality Act of 1940. Accordingly, we rest on the arguments in our brief in *Kennedy* v. *Mendoza-Martinez*, No. 19, on the power of Congress to enact Section 401(j), and do not repeat them here. We discuss in this brief only the particular circumstances of appellee's case which may be thought to have a bearing on the disposition of his litigation.

A. The record shows that appellee voluntarily remained abroad, after receiving several notices in 1953 from his draft board to report for pre-induction physical examinations and for induction, for the purpose of evading military service. In 1952-1953, he pursued an offer of employment at Harvard Medical School to the point of determining the date on which he would return to the United States and begin his new duties. He abandoned this plan only upon learning that his new position would not lead to his being deferred from the draft. He ignored the suggestion that, if he did not wish to return to this

country until it was clear that he would be taken into the service, he could take his pre-induction physical examination at Frankfurt, Germany. When Great Britain refused to renew his residence permit in 1954, he sought a position in Czechoslovakia, instead of returning to the United States. He seems to have been quite aware that he had lost his United States citizenship. He remained in Czechoslovakia for five years (1954-1959) without seeking a new American passport (his old passport having expired in 1952); and his 1954 residence permit at Prague referred to him as stateless.

B. The fact that appellee (unlike Mendoza-Martinez) did not have another nationality when he lost his American citizenship under Section 349(a)(10) does not affect the power of Congress to provide for his expatriation. In enacting Section 401(j) (the predecessor of Section 349(a)(10)), Congress was aware that many men possessing both United States and Mexican citizenship were fleeing to Mexico to avoid our draft, but Congress was not required to confine its legislation to that precise category.

Separation of nationals from their allegiance, without acquisition or possession of another nationality, is not unique. In this country it was known during our early days; and, ever since the Citizenship Act of 1907 first established statutory provisions for denationalization through performance of specific acts, statelessness has been a possible result of expatriation. The anomalous status of the stateless individual does presents serious problems in the world of today, but these are for the political branches to consider and to solve —and the effort is currently underway. The fact that general expatriation laws may lead in some cir-

cumstances to statelessness is not a reason for judicial invalidation of the legislation.

In this case, there is no reason to believe that the appellee has any true cause for complaint arising out of the fact that his voluntary actions have resulted in his being rendered stateless. He deliberately and freely chose a course of conduct which he knew would lead to his loss of American nationality. He did everything short of becoming a citizen of another country—including the establishment of a new domicile in Czechoslavakia and residence there for seven years—to show that he did not consider himself under obligation to the United States. He now appears to meet the basic requirements for Czechoslavakian naturalization, and there is no cause to infer that his position is any different from that of any other voluntary émigré.

ARGUMENT

Introduction

The threshold question is procedural or jurisdictional—could the appellee, as the three-judge district court ruled, properly institute an action for a declaration of American citizenship and thereby challenge the denial by the State Department of his application at Prague, Czechoslavakia, for an American passport on the ground that he had lost his American citizenship, or in order to vindicate his claim to citizenship was he required to use the special procedures fashioned by Congress in Section 360(b) and (c) of the Immigration and Nationality Act of 1952? If this Court finds, as the government urges, that only the procedures of Section 360 were open to appellee, then the judgment of the district court should be reversed on the ground that that court lacked jurisdiction to enter-

tain this action. But if the Court is of the opinion that appellee's suit for declaratory relief was properly instituted, then the substantive issue presented by the government's appeal is the constitutionality of Section 349(a)(10) of the Immigration and Nationality Act of 1952, providing for loss of United States nationality by one who remains outside the United States in a time of national emergency in order to evade or avoid service in the armed forces of the United States. In Point I, we discuss the jurisdictional question. Point II is devoted to the constitutional issue.

Before turning to these problems, we are required by the Court's Rules (Rule 16(4)) to take account of the fact that the Court did not note probable jurisdiction but postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 49). 365 U.S. 808. Presumably this course was taken because of the government's challenge, in its jurisdictional statement in this Court, to the jurisdiction of the district court over this declaratory action. We believe, however, that the Court clearly has jurisdiction of this appeal even though the district court should not have proceeded with the suit.

Under 28 U.S.C. 1252, a party may appeal directly to this Court from a judgment of a federal district court "holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." This is precisely such a case. The action is a civil one; the Secretary of State is the appellant; and the district court's judgment held an Act of Congress invalid. Section 1252 does not make the jurisdiction of this Court dependent in any way upon the

authority of the lower court to act, but solely upon its decision and upon the parties, as well as the civil nature of the proceeding.

Unfortunately, in our notice of appeal (R. 42) and jurisdictional statement, we referred, not to 28 U.S.C. 1252, but only to 28 U.S.C. 1253, providing for a direct appeal ("[e]xcept as otherwise provided by law") from an order granting an injunction "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Our failure to mention Section 1252 does not, of course, deprive this Court of the plain jurisdiction it would otherwise have under that provision. Accordingly, we believe that there is no need to consider the application of Section 1253 since jurisdiction rests solidly upon Section 1252.

If the scope of Section 1253 is to be considered, we submit that it also supports jurisdiction here even though the Court accepts our contention that this case should not have been heard on its merits by one judge, let alone three judges. It is settled, with respect to Section 1253, that this Court does not have appellate jurisdiction unless the case "required" three judges in the district court.[8] But a case "requires" three judges, in the statutory sense, when the complaint seeks to enjoin enforcement of a federal statute on substantial constitutional grounds, even though there are other grounds on which the decision of the court can and should rest. See 28 U.S.C. 2282; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73. The prayer in this complaint for an injunction on consti-

[8] *Wilentz* v. *Sovereign Camp*, 306 U.S. 573, 582; *Rorick* v. *Board of Commissioners*, 307 U.S. 208, 212; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368.

tutional grounds (R. 5) is critical. The case is not taken out of the three-judge class by a defense which may require the dismissal of the entire action without considering the constitutional issue.

I

SECTIONS 360(b) AND 360(c) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 PROVIDE THE EXCLUSIVE PROCEDURES WHEREBY AN INDIVIDUAL WHO HAS BEEN DENIED A RIGHT OF AMERICAN CITIZENSHIP WHILE RESIDING OUTSIDE THE UNITED STATES CAN SEEK VINDICATION OF HIS CLAIM TO CITIZENSHIP.

Section 360 of the Immigration and Nationality Act of 1952 (*supra*, pp. 3-5) establishes special procedures for determining claims to American citizenship by those within and without the country. Subsection (a) covers claimants "within the United States" and provides for a declaratory action against the head of the agency denying the claimant a right or privilege of citizenship—except that such an action for a declaratory judgment cannot be instituted if the issue of citizenship arises in connection with an exclusion proceeding. Subsections (b) and (c) deal with citizenship claimants "not within the United States." The former provides, with limitations, for the issuance abroad of certificates of identity "for the purpose of traveling to a port of entry in the United States and applying for admission." The latter subsection declares that a person issued such a certificate "may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States"; judicial review is to be by habeas corpus "and not otherwise."

The government's position is that appellee—a nonresident "not within the United States"—was required to pursue this remedy afforded him by subsections (b) and (c) of Section 360, and could not choose to litigate his claim to citizenship in a declaratory action in the District of Columbia. Congress has limited the declaratory remedy to citizenship claimants "within the United States."

A. Congress Clearly Intended That the Procedures of Section 360(b) and (c) Should Be the Exclusive Method by Which Citizenship Claimants Abroad Could Challenge An Administrative Denial of Citizenship Rights.

To assess the force and coverage of Section 360(b) and (c) of the Immigration and Nationality Act of 1952, an analysis of the development of the law which preceded its adoption is essential. The terms and immediate legislative history of the statute cannot be understood apart from this background. We therefore begin with these antecedents, and then turn to a consideration of the statute and its direct legislative history, viewed within this frame of reference. Together, these materials show that it was the intent of Congress that Section 360(b) and (c) provide the exclusive mode of relief for citizenship claimants like appellee.

1. The remedies prior to the 1952 Act

a. The pre-1940 cases

Prior to the adoption of the Nationality Act of 1940, 54 Stat. 1137, it was the prevailing judicial view that persons residing abroad could test their citizenship claims only in exclusion proceedings—by habeas corpus—challenging an adverse administrative decision. The administrative determination of the facts of the citizenship claim was deemed to be conclusive if sup-

ported by evidence—just as was true of all other disputed issues of fact. Judicial review did not entitle the applicant to a *de novo* trial on the facts but only to the traditional review of the legality of the detention. See *United States* v. *Ju Toy*, 198 U.S. 253, 263; *Chin Yow* v. *United States*, 208 U.S. 8, 12; *Tang Tun* v. *Edsell*, 233 U.S. 673, 675; *Ng Fung Ho* v. *White*, 259 U.S. 276, 282; *Quon Quon Poy* v. *Johnson*, 273 U.S. 352, 358.

These principles found their origin in the *Ju Toy* case, *supra*, decided by this Court in 1905. There, a man of Chinese ancestry, who had previously resided in the United States, sought to re-enter the country after a temporary departure, claiming that he was a native-born citizen. He was excluded by the immigration authorities who found that he had not been born in the United States and was not an American citizen. After exhausting his administrative remedies, the claimant sued out a writ of habeas corpus to test the validity of his detention (he was being held for return to China). The district court, apparently on new evidence, decided that Ju Toy was a native-born citizen and ordered his release. On appeal, the court of appeals certified to this Court the question of the scope of judicial review available to the claimant. Mr. Justice Holmes, speaking for this Court, ordered that the writ be dismissed on the ground that the administrative decision should have been accepted, and formulated this governing principle (198 U.S. at 263):

> The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to

> deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial.

Some fifteen years later, after this principle had been reaffirmed in this Court (see the cases cited *supra*, p. 25), Mr. Justice Brandeis relied upon it in *Ng Fung Ho* v. *White*, *supra*, when he drew a distinction between the judicial review available to nonresident and to resident citizenship claimants. As to the former he cited the *Ju Toy* decision for the rule that "the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing" (259 U.S. at 282). As to the latter (resident claimants), he held that due process "entitled [them] to a judicial determination of their claims that they are citizens of the United States * * *." (*Id.* at 285). The decisive factor was the location, in legal contemplation, of the person seeking judicial relief.[1] And while the remedy available to a resident citizenship claimant was subsequently enlarged to include an action for declaratory relief under the Declaratory Judgment

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[1] This residence test was analogous to the long-recognized distinction between the rights of the alien seeking admission to the United States, and of the resident alien against whom deportation proceedings have been instituted. See, *e.g.*, *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660. As this Court phrased that distinction in *Shaughnessy* v. *Mezei*, 345 U.S. 206, 212: "It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. * * *. But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned' [citing *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544, and *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660]."

Act of 1934, 48 Stat. 955-956, as amended, 28 U.S.C. 2201,[8] no similar *de novo* judicial remedy was recognized as available to one residing abroad. The rule of the *Ju Toy* case originated and was largely developed in cases involving applicants of Chinese ancestry, but it was applied generally. See, *e.g., Di Giorlando* v. *Curren,* 2 F.2d 179 (S.D. N.Y.); *Scimeca* v. *Husband,* 6 F.2d 957 (C.A. 2); *Ex Parte Ver Pault,* 86 F.2d 113 (C.A. 2); cf. *Medeiros* v. *Watkins,* 166 F.2d 897, 899-900 (C.A. 2).

In short, when Congress came to consider the Nationality Act of 1940, the prevailing judicial view was that nonresidents claiming United States citizenship were entitled to proceed to establish their claims to citizenship only as part of an immigration proceeding testing their right to be admitted to the country. Such nonresident claimants had no additional right to try out the facts of their citizenship in a *de novo* judicial trial. Only to the extent that the nonresident could show that the administrative authorities in the exclusion proceeding had denied him a fair opportunity to establish citizenship, or had acted in an illegal or improper way, or had abused their discretion, was he entitled to judicial relief.

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[8] See *Perkins* v. *Elg,* 307 U.S. 325, where a resident claimant threatened with deportation who had been denied an American passport brought a declaratory judgment action to determine her citizenship. Cf. *McGrath* v. *Kristensen,* 340 U.S. 162, involving an action by a resident alien, who had previously obtained an exemption from military service, for a declaration that he was nonetheless eligible for citizenship.

b. Section 503 of the Nationality Act of 1940

The legislative history of the Nationality Act of 1940 indicates that Congress understood the law as we have just described it, and, in view of the important effect of the proposed legislation on existing rights of citizenship, thought it necessary to devise a more liberal remedy—the general provision for declaratory relief embodied in Section 503, *supra*, pp. 5-6. When the House of Representatives was debating Amendment No. 5 of the Conference Report (which later became Section 503),* Congressman Jenkins evinced concern as to the meaning and effect of the provision (86 Cong. Rec. 13247). In explaining its purpose, Congressman Rees, one of the House Managers, had this to say (*ibid.*):

> We have a rather new situation here, and that is we are cutting off the claim to citizenship of these thousands of persons under this provision in the bill who do not comply with its terms and therefore it was deemed advisable that some chance be given them to have what might be called their day in court. We have safeguarded the situation extremely carefully and feel that so far as possible we have prevented any abuse of it. It was my contention when this measure was up for considera-

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* See H. Conf. Rept. No. 3019, 76th Cong., 3d Sess., on H. R. 9980. Section 503 had not been contained in the Draft Code on Nationality which the President had submitted to Congress in 1938. Concern at the absence of a remedy by a citizen claimant overseas had been expressed at the Committee hearings (see Hearings before the House Committee on Immigration and Naturalization on H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., pp. 285-286). Section 503 came into the bill as a Senate amendment and was adopted with no debate by that body (see S. Rept. No. 2150, 76th Cong., 3d Sess., p. 4; 86 Cong. Rec. 12818). Following the debate adverted to in the text (*infra*, pp. 28-29), it was adopted in the House (86 Cong. Rec. 13250).

> tion in the committee that such people did have the right to go into court either on a declaratory judgment or under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right.

See also 86 Cong. Rec. 13248.

Congress—or at least the majority of its members most intimately concerned with questions of citizenship status under the 1940 Act—took the prevailing law to be that citizenship claimants outside the United States had only a limited and narrow right to vindicate claims to citizenship. Since the Nationality Act of 1940, as Congressman Rees put it, was "cutting off the claim to citizenship of * * * thousands of persons" —through the new loss-of-nationality provisions embodied in the Act [10]—it was decided to ameliorate the rigors of the existing law and to provide a more liberal method by which these claimants might have their day in court.

This new remedy (Section 503) was drawn in the broadest terms. Under its provisions, a claimant whose citizenship was denied by administrative authorities could institute a declaratory judgment suit in the federal courts to determine his right to citizenship, whether he was physically in the United States or abroad. Cf. *Mah Ying Og* v. *McGrath*, 187 F.2d 199, 201-202 (C.A.D.C.). The section further authorized the claimant to apply for a certificate of identity in order to travel to the United States to prosecute the suit personally. See *supra*, pp. 5-6.

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[10] The Act contained provisions relating to (i) previous residence as a prerequisite to the retention of American nationality by certain persons born abroad as Americans (Section 201(g)(h)), and (ii) various acts leading to loss of American nationality (Sections 401-410). See 54 Stat. 1139, 1168-1171.

c. Unforeseen effects of Section 503

The liberality of this new remedy soon triggered unforeseen consequences. Though Section 503 was little used in the years immediately following its enactment,[11] starting in 1947 an increasing number of suits began to pile up, primarily as the result of actions by persons of Chinese birth claiming to be the foreign-born children of American citizens. Beginning with August 1947, when the first Chinese case under Section 503 was commenced in the federal courts (*Mah Ying Og* v. *McGrath*, 187 F.2d 199, *supra*), by the end of 1952, 1288 such cases were instituted under that section by Chinese claimants. See *Ly Shew* v. *Acheson*, 110 F. Supp. 50, 54-55 (data collected) (N.D. Cal.), vacated and remanded *sub nom. Ly Shew* v. *Dulles*, 219 F.2d 413 (C.A. 9); *Dong Wing Ott* v. *Shaughnessy*, 116 F. Supp. 745, 751-752 (S.D. N.Y.), affirmed, 220 F.2d 537 (C.A. 2), certiorari denied, 350 U.S. 847. These cases presented special and complex problems for the federal courts. Almost all of the claims involved factual issues difficult to resolve since they were based on self-serving oral assertions with respect to events occurring years before, thousands of miles away, and were almost impossible to evaluate due to barriers of language and culture.[12]

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[11] There are apparently only four reported cases in which Section 503 relief was sought in the first five years after its adoption. See Note, Wis. L. Rev. (1950) 677, 682, n. 27.

[12] A discussion of the scope and nature of this problem is contained in the government's brief in *Lee Kum Hoy* v. *Shaughnessy*, No. 32, O.T. 1957, pp. 21-33. See also the Annual Report of the Attorney General for 1956, pp. 111-113, and for 1957, pp. 121-123; cf. *Ly Shew* v. *Acheson*, *supra*.

2. The Remedy Adopted in Section 360 of the Immigration and Nationality Act of 1952

Congress was aware of this problem when it undertook the general review of immigration and nationality legislation ultimately resulting in the 1952 Act; and it was prompted to fashion a new remedy for the new statute. After considering a number of proposed solutions, Congress devised a procedure which may be characterized as midway between the strict principle of the *Ju Toy* case *supra,* pp. 24-26) and the liberality of Section 503—one which would provide a remedial route for overseas citizenship claimants and yet avoid the pitfalls which Congress believed to inhere in the procedure under Section 503 of the 1940 Act.

a. The legislative history of Section 360

(*1*) In 1950, the Senate Committee on the Judiciary —which in 1947 had been authorized (pursuant to S. Res. 137) to commence a full and complete investigation into the adequacy of existing immigration laws— reported its dissatisfaction with the Section 503 procedure and recommended that its provisions be radically revamped. The Committee noted that "the section has been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed." It recommended "that the provisions of section 503 * * * be modified to limit the privilege [of declaratory relief] to persons who are in the United States, and that any such action shall be brought within 5 years after the finding that the person is not a national of the United States." S. Rept. No. 1515, 81st Cong., 2d Sess., p. 777.

The Senate Committee bill (S. 3455, 81st Cong.) which accompanied this report carried out this aim.

Section 359 provided for declaratory relief only for claimants in the United States.[13] No provisions were included for testing the citizenship claims of non-residents. The Immigration and Naturalization Service favored this approach, commenting, in its analysis of the measures, that by limiting declaratory relief "to persons within the United States, the bill will remove from the law one method of obtaining easy entry into the United States, which is regarded as a satisfactory addition to the law."[14]

(*2*) These early proposals met criticism from several sources. A number of witnesses who testified at the joint hearings conducted by the Senate and House Judiciary Committees in March and April 1951, on the early bills and on a bill introduced by Congressman Celler (H.R. 2816, which retained the substance of Section 503),[15] expressed concern over the deletion of a procedure under which citizenship claimants abroad could test the administrative denial of citizenship rights. *E.g.*, Hearings, pp. 106-109, 338-339, 443, 522, 527, 673.[16] The Deputy Attorney General, in his statement to the Committees, also objected to the adoption

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[13] A similar provision was contained in Section 360 of the revised bills introduced in the first session of the 82d Congress, both in the Senate (S. 716) and in the House (H.R. 2379).

[14] See Analysis of S. 716, a Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality: And for other Purposes, p. 360-3.

[15] Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 716, H.R. 2379, and H.R. 2816, 82d Cong., 1st Sess., hereinafter referred to as "Hearings, p. ."

[16] One recommendation which gained support (see *infra*, pp. 33-34, 36) was to permit a declaratory judgment action for citizenship claimants abroad only if they had been physically present in the United States at some prior time. Hearings, pp. 108-109.

of the proposed remedy unless it was amended to provide for the protection of claimants abroad who had more than a frivolous claim to American citizenship. The thrust of the proposal of the Department of Justice was that citizenship claimants abroad "shall be required to apply for admission to the United States at a port of entry and go through the usual screening, interrogation, and investigation, applicable in the cases of other persons seeking admission to the United States, so that the Immigration and Naturalization Service will have as complete a record as possible on each person entering this country claiming to be a national thereof" (Hearings, pp. 711, 721).

(3) From these early recommendations two different solutions to the problem emerged in the later House and Senate versions of what was to become the Immigration and Nationality Act of 1952.

The House version retained the declaratory judgment procedure with some limitations, whether the claimant was here or abroad at the time his right of citizenship was denied. As explained by the House Judiciary Committee in H. Rept. No. 1365, 82d Cong., 2d Sess., on H.R. 5678, p. 87:

> The bill modifies section 503 of the Nationality Act, as amended. While it substantially retains the provisions applicable to the person within the United States who is seeking by court action to have his claim to citizenship determined, it limits the availability of a certificate of identity to the case of the individual abroad who seeks such determination. *Persons who have been physically present in the United States, or persons born abroad of United States citizen parents, only, may*

> ***institute the court action specified and seek identity certificates under the provision of the bill.*** [Emphasis added.]
>
> The bill requires institution of proceedings within a period of 5 years after the final administrative denial of a claim to citizenship.

The Senate version, on the other hand, rejected the declaratory judgment route for those residing abroad. Instead, adopting the proposal recommended by the Department of Justice (see *supra*, pp. 32-33), it fashioned a remedy for overseas citizenship claimants within the regular admission machinery utilized by the Immigration and Naturalization Service for persons seeking entry into the country. As the Senate Judiciary Committee described its plan: [17]

> The bill modifies section 503 of the Nationality Act of 1940 by limiting the court action exclusively to persons who are within the United States * * *.
>
> The bill further provides that any person who has previously been physically present in the United States but who is not within the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. The net effect of this provision is *to require* that the determination of the nationality of such person shall be made in accordance with the *normal immigration procedures.* These procedures include review by habeas corpus proceedings where the issue of the nationality

[17] S. Rept. No. 1137, 82d Cong., 2d Sess., on S. 2550, p. 50.

status of the person can be properly adjudicated. [Emphasis added.] [18]

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[18] Section 360 of the bill reported by the Senate Committee (S. 2550) provided as follows:

PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN THE EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL

SEC. 360. (a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any deportation or exclusion proceeding under the provisions of this or any other Act, or (2) is in issue in any such deportation or exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe

(4) After joint consideration of these two proposals, the Senate version, with one minor modification,[19] prevailed. See H. Rept. No. 3096, 82d Cong., 2d Sess., pp. 117-118, 127 (Conference Report). Section 360(a) of the Act provides for a declaratory remedy only for citizenship claimants within the country, and even from that class it excepts two situations: (i) those instances in which the issue of citizenship arises in or as part of an exclusion proceeding, and (ii) cases in which the final administrative denial of citizenship rights occurred more than five years before suit was brought. Subsection (b) of Section 360 provides for

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rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

[19] The one change made by the Conference Committee in the Senate version of Section 360 was to provide that the certificate-of-identity procedure in subsection (b) should be applicable to a person under sixteen years who was born abroad of a United States citizen parent, as well as to persons who at some time prior to their application for the certificate had been physically present in the United States (*supra*, p. 4). The Senate bill restricted the certificate procedure to persons who had previously been present in the United States (see fn. 18, *supra*).

the issuance of certificates of identity to claimants "not within the United States," to enable them to come to a port and apply for admission; but such certificates are to be available only to persons who were at some previous time "physically present in the United States" or to those under 16 years born abroad of a United States citizen parent. Under subsection (c), persons issued these certificates have to test their right to admission by applying at a port of entry and pursuing their remedy in exclusion proceedings, and ultimately by habeas corpus "and not otherwise." See *supra*, pp. 3-5.

b. The objectives of Section 360.

In the light of the historical development we have outlined (particularly the experience under Section 503 of the 1940 Act), the immediate legislative history and the terms of Section 360 prove that Congress meant: (1) to restrict the declaratory remedy to citizenship claimants already within the country, and thus to remove the excesses which, in the view of Congress, had followed upon the use of the declaratory remedy (in Section 503) by claimants abroad; (2) to provide a remedy for claimants abroad which would permit a preliminary sifting of the claims and development of the facts in administrative proceedings within the Immigration and Naturalization Service before the contested issues, legal or factual, would be determined by the courts; and (3) to make the special procedures of Section 360(b) and (c) exclusive for citizenship claimants "not within the United States." Thus, the result of the Congressional consideration, in the 1952 Act, was legislation which rejected both extremes—the broad liberality of Section 503 which Congress

believed to have been subject to easy misuse by fraudulent claimants (*supra*, pp. 30-32), and the view expressed in those bills which provided no judicial remedy at all for citizenship claimants outside the United States (*supra*, pp. 31-32). In the case of claimants outside the country, Congress deliberately adopted the Senate provision which was designed—as the Senate report said (*supra*, p. 34)—"*to require*" that the determination of nationality "shall be made in accordance with the normal immigration procedures" (emphasis added).

Nevertheless, the District Court for the District of Columbia has held, contrary to the rulings in several other districts, that a claimant outside the country may, at his option, institute a declaratory action without coming to the United States and going through the administrative immigration process which Congress was so careful to devise.[20] One suggestion in these District of Columbia decisions is that, since the procedures of Section 360(b) and (c) are time-consuming

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[20] In addition to the decision below (R. 35), see, *e.g.*, *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709; *Guerrieri* v. *Herter*, 186 F. Supp. 588; *Schneider* v. *Herter*, decided August 17, 1960, pending on appeal to the court of appeals. Cf. *Frank* v. *Rogers*, 253 F. 2d 889 (C.A.D.C.). Contrary decisions recognizing the exclusivity of the statutory procedures are the rule elsewhere in the federal courts. See, *e.g.*, *Sato* v. *Dulles*, 183 F. Supp. 306 (D. Hawaii); *Yamamoto* v. *Dulles*, 16 F.R.D. 195 (D. Hawaii); *Avina* v. *Brownell*, 112 F. Supp. 15 (S.D. Tex.); *Basma Abed Harake* v. *Dulles*, 158 F. Supp. 413 (E.D. Mich); *Vasquez* v. *Brownell*, 113 F. Supp. 722, 725 (W.D. Tex.); *Matsuo* v. *Dulles*, 133 F. Supp. 711 (S.D. Cal.); *Correia* v. *Dulles*, 129 F. Supp. 533, 534 (D. R.I.); cf. *Ferretti* v. *Dulles*, 150 F. Supp. 632 (E.D. N.Y.), affirmed, 246 F. 2d 544, 547 (C.A. 2); *Strupp* v. *Dulles*, 258 F. 2d 622, 624 (C.A. 2); *Samaniego* v. *Brownell*, 212 F. 2d 891, 894 (C.A. 5); *Lew Hsiang* v. *Brownell*, 234 F. 2d 232 (C.A. 7); *Puig Jimenez* v. *Glover*, 255 F. 2d 54, 56 (C.A. 1); *Ficano* v. *Dulles*, 151 F. Supp. 650, 651 (E.D. N.Y.).

and financially burdensome, Congress could not have meant to require that an overseas claimant, who has been denied a citizenship right by an administrative agency overseas, again run the gamut of administrative relief as provided in subsections (b) and (c). But, as we have shown, Congress was of the opinion that the remedy of an action for declaratory judgment by persons thousands of miles away was too easy—that it encouraged fraud and made resolution of issues of fact too difficult. This was Congress's view of the experience with Section 503 of the 1940 Act, under which thousands of overseas claimants of Chinese descent brought declaratory actions as alleged foreign-born children of American parents—in the course of which suits there was grave reason to believe that many frauds had been perpetrated. In the wake of this experience with the 1940 statute, the legislative history of Section 360 shows that Congress knowingly rejected the suggestion that, under the new Act, citizenship claimants residing overseas be allowed to test out their claims to citizenship directly in the courts without coming to this country or pursuing their remedies within the immigration system.[21] The decision below would establish a remedy for such persons which Congress deliberately refused to adopt.

Aside from the possibility of fraud, there is another rational basis for the Congressional conclusion that it would be desirable to have claims of United States

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[21] Congress felt so strongly that the normal immigration procedures should be followed that it withheld the declaratory remedy (in Section 360(a)) from those claimants already "within the United States" if the issue of nationality arose in connection with an exclusion proceeding or was an issue in an exclusion proceeding (*supra*, pp. 3, 23).

nationality considered, in the first instance, by administrative officers in the United States under the normal procedures for hearing and determination which have evolved over the years with respect to immigration matters. Contested claims to United States nationality by persons residing abroad usually involve issues of fact. The existence of such factual issues with respect to derivative citizenship of persons claiming to be children of American parents has been abundantly demonstrated by the Chinese cases. Factual questions requiring investigation also arise frequently in other nationality cases. Thus, where loss of nationality flows from an objective act presumably simple to prove —such as service in a foreign army or voting in a foreign election—there have been difficult problems as to voluntariness. See *Nishikawa* v. *Dulles*, 356 U.S. 129. A superficially simple question like the fact of residence abroad can be complicated by disputed claims that governmental action prevented the coming or return to the United States. See *Montana* v. *Kennedy*, 366 U.S. 308. As to the ground for loss of nationality involved here—intent to evade military service by remaining abroad—the question of intent is always a factual one, often difficult to resolve without a full presentation of all relevant circumstances. See *Gonzales* v. *Landon*, 350 U.S. 920. In the light of the prevalence of such issues, Congress could well have been (and obviously was) impressed with the view expressed by the Deputy Attorney General that citizenship claimants abroad should be required to "go through the usual screening, interrogation, and investigation" applicable to other persons seeking admission, so that there would be as complete an investigation and record as possible (see *supra*, pp. 32-33).

The suggestion that this procedure is unnecessary because a person abroad, who has been denied a passport, has already utilized the State Department procedures ignores the expressed purpose of the mechanism established by Section 360(b) and (c). State Department officials abroad cannot, in the nature of their duties and responsibilities, conduct the type of detailed inquiry and formal hearings available at a port of entry of the United States. The administrative decision abroad is simply the official action which creates the purported injury for which redress is sought—it is the condition precedent to the beginning of the full administrative procedure, not its termination.

The detailed administrative inquiry and procedure Congress desired is that adopted by Section 360(b) and (c). Once denied a citizenship right by the overseas official, the claimant is required to apply for a certificate of identity under subsection (b), for the purpose of traveling to a port of the United States. When such a certificate has been obtained,[22] the claimant may then travel to this country and apply for entry as a United States citizen. Immigration and Naturalization Service officers must then inquire into and pass upon his status in the same manner as they would consider the admissibility of other applicants for entry.

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[22] The applicant is entitled to detailed review procedures if the consul denies a certificate (see subsection (b) of Section 360 and 22 C.F.R. 50.24-50.26 (1958)). However, we need not here discuss the question of whether, if the Department of State ultimately refuses to grant the certificate, judicial review is available, since appellee in this case never applied for such a certificate although he was informed that prompt consideration would be given such an application (R. 100-101). See *supra*, p. 11.

The investigatory facilities of the Service are routinely available. The adjudicatory proceedings that follow are formalized by statute (Sections 231-236 of the 1952 Act) and further implemented by regulation (8 C.F.R. 236.1-236.6 (Supp. 1961)). A hearing is required at which the applicant is entitled to counsel and to present all relevant evidence; the special inquiry officer who conducts the hearing must not have participated in the prosecutive or investigative aspects of the case; a formal record of the hearing must be kept and must provide the basis for the hearing officers' decision; the applicant may appeal an adverse decision to the Board of Immigration Appeals; and the decision on appeal must be based on the evidence previously adduced. Judicial review is available through a habeas corpus proceeding. In short, a full administrative hearing—geared to the production and analysis of all pertinent evidence—is afforded the claimant, with appropriate judicial review at the conclusion of the administrative process.

The result is that a full record is likely to be obtained, and the issue of citizenship is initially considered by authorities able, by experience and training, to test the factual validity of the citizenship claim. The claimant is present and can testify himself; there is no need to rely on written self-serving statements not subject to cross-examination. Moreover, the investigatory resources of an expert agency (the Immigration and Naturalization Service) are available to help appraise obtuse and difficult factual allegations, to sift out the manifestly frivolous claim, to illumine and sharpen the basic facts in the issue, and to add new evidence. Such an administrative process can serve

the function of clarifying and narrowing the areas of dispute, and of providing a full record which might not be available in a simple declaratory action instituted from abroad in a district court. This would clearly be a valid reason for Congress to require the exhaustion of administrative procedures before burdening the courts with the necessity of reviewing such citizenship claims.

Finally, it is plain that the central premise underlying Congress's considered decision of how best to mold a remedy for citizenship claimants residing abroad was that the new remedy would be exclusive. It is inconceivable that, in its careful weighing of divergent views (see *supra*, pp. 31-37), Congress intended the procedure ultimately adopted to be nothing more than a permissive avenue of relief to be set in motion only if the applicant so desired. Congress accepted the Senate version of Section 360, and the Senate Committee explicitly declared that the procedures of Sections 360(b) and (c) were *required* to be followed by claimants not within the United States (*supra*, p. 34). Moreover, the careful distinction in Section 360 between declaratory judgment actions by claimants within the United States (Section 360(a)), and habeas corpus review by claimants outside the United States (after exhaustion of immigration remedies) (Section 360(b) and (c)), would be rendered meaningless if the overseas claimant could institute a declaratory action without coming to the United States and following the administrative process which Congress specified.

There would be no purpose to the elaborate statutory machinery.[23]

That the statute speaks permissively, using "may" rather than "shall," means only that those citizenship claimants abroad who desire to test an administrative denial of citizenship may do so by following the procedure prescribed. This language cannot be taken to mean that such claimants may do so either under the statute or by way of an extra-statutory suit for a declaratory judgment. The term "may," instead of "shall," is also used in subsection (a) of Section 360, with respect to claimants within the United States. Certainly, it could not be contended that claimants in that class have the choice of either proceeding under Section 360 (a) or of following some other procedure not subject to the limitations of that subsection (but cf. *Frank* v. *Rogers*, 253 F.2d 889 (C.A.D.C.)). And the same word "may" appeared in Section 360(b) and (c) of the Senate bill (S. 2550) (adopted by the full Congress)—as to which the Senate Committee said: "The net effect of this provision is *to require* that the determination of the nationality of such person [*i.e.*, a claimant not within the United States] *shall* be made in accordance with the normal immigration procedures" (emphasis added) (*supra*, pp. 34-35).

It is a familiar canon that the designation by Congress of a specified mode of redress generally excludes any other. See, *e.g.*, *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297,

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[23] This is not a case, such as *Leedom* v. *Kyne*, 358 U.S. 184, in which the absence of the remedy pursued by the plaintiff would mean that there would be no judicial remedy to vindicate a right given by Congress. In the present situation, the appellee's rights could be vindicated through the procedure established by Section 360(b) and (c), including judicial review in habeas corpus proceedings.

301, and cases there cited. In this particular statute, Congress not only selected a certain mode of redress but made convincingly clear that it was the only redress that it intended to make available to claimants like this appellee. Since he never utilized this administrative procedure, his action for judicial review was premature and should have been dismissed.

B. Congress Could Constitutionally Require Exhaustion of the Administrative Process, As In Section 360(b) and (c), Before Permitting Resort to the Courts.

There can be no question that if, as we urge, Congress intended the remedy provided by Section 360(b) and (c) to be utilized before resort to the courts, it had the constitutional power so to provide. The doctrine of exhaustion of administrative remedies presupposes that Congress can demand prior resort to the administrative process. Cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 50-51; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; see *United States* v. *Sing Tuck*, 194 U.S. 161. As Mr. Justice Holmes observed in *Sing Tuck*, where habeas corpus was sought after a preliminary determination that the applicants for entry were not American citizens but before any appeal was taken to the Secretary of Commerce and Labor, as required under the applicable law, "[w]hatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. * * * [B]efore the courts can be called

upon, the preliminary sifting process provided by the statutes must be gone through with" (194 U.S. at 168-169, 170). That a person may have to travel to the United States to establish his claim, although it would be easier to remain abroad while his rights are being determined, is not a valid constitutional reason for failing to apply this well established principle. As noted above (*supra*, pp. 41-42), the type of formal hearing envisaged by Section 360(b) and (c) would not be feasible in foreign countries. It is not irrational to provide that a non-resident claiming United States nationality must seek to establish his claim at a port of the United States.

The record in this case shows that the federal authorities were ready to give immediate consideration to an application by appellee for a certificate of identity to enable him to seek to establish his claim to United States citizenship. See *supra*, p. 11.[24] Since there has not as yet been an administrative determination by the Immigration and Naturalization Service, as contemplated by Congress, any question as to the scope and nature of the ensuing judicial review would be premature. Congress has provided in Section 360(c)

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[24] In an early case construing Section 360, the District Court for the District of Columbia seemingly recognized that Section 360(b) and (c) provided the exclusive remedy for citizenship claimants abroad. *D'Argento* v. *Dulles*, 113 F. Supp. 933. The different rule thereafter adopted in *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709, *supra*, p. 38, fn. 20, involved an applicant who had never been in the United States and was not a derivative citizenship claimant under sixteen years of age, and hence was not eligible for travel documents under Section 360(b); cf. *Estevez* v. *Brownell*, 227 F. 2d 38 (C.A. D.C.). Whatever problems that situation may present (i.e., whether, in the absence of another remedy, the general declaratory judgment statute should be deemed available), this case does not involve them. Appellee is statutorily eligible for a certificate of identity.

that review of the administrative proceeding shall be in "habeas corpus proceedings and not otherwise." While this settles the form of the remedy, it does not necessarily determine its scope.[25] It is sufficient for present purposes to note that, even assuming that the question of citizenship is one as to which there must be a judicial trial *de novo* (if the claimant so desires), it was still within the power of Congress to require that the administrative procedure of the Immigration and Naturalization Service be utilized before there could be access to the courts. Cf. *United States* v. *R.C.A.*, 358 U.S. 334, 346-348; *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 62-65; *Far East Conference* v. *United States*, 342 U.S. 570, 574-575.

II

SECTION 349(a)(10) OF THE IMMIGRATION AND NATIONALITY ACT OF 1952 IS CONSTITUTIONAL AS APPLIED TO APPELLEE

In the respects pertinent here, Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pp. 2-3, is the same as Section 410(j) of the Nationality Act of 1940 (involved in the *Mendoza-Martinez* case, No. 19), and there are no relevant materials in the immediate legislative history of the 1952 Act bearing on the validity of the substantive provisions of Section 349(a)(10)—except the plain indications that Congress

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[25] While, as indicated, *supra*, pp. 25-26, *United States* v. *Ju Toy*, 198 U.S. 253, holds that a *de novo* trial is not necessary for persons seeking admission, the present force of that ruling has been questioned. See Judge Frank dissenting in *Medeiros* v. *Watkins*, 166 F. 2d 897, 900 (C.A. 2); cf. *Carmichael* v. *Delaney*, 170 F. 2d 239 (C.A. 9). And even though the form of the remedy is habeas corpus, it is possible to have a *de novo* trial on the facts, if that is found to be appropriate. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 183, 186.

was simply carrying forward into the comprehensive new statute the provisions of Section 410(j) of the older Act.

Congress did include in the new Act a provision that "failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States" (*supra*, p. 3). But that presumption is not involved in the present case. The court below did not rely on it, in any way, in holding that appellee's purpose in remaining abroad was to evade military service. Rather, the court first ruled that, upon appellee's proof of his birth in this country, "the burden is upon the Government to prove by clear, convincing and unequivocal evidence the act it relies upon to show expatriation" (citing *Nishikawa* v. *Dulles*, 356 U.S. 129, 133) (R. 35-36). The court then held that "the Government has met this burden" (R. 36). In other words, the court applied Section 349(a)(10) exactly as if it were Section 401(j) of the 1940 Act.

Accordingly, we rest in this case on the arguments in our brief in the *Mendoza-Martinez* case, No. 19, on the power of Congress to enact Section 401(j), and shall not repeat them here as applied to Section 349(a)(10) of the 1952 Act. Just as the statutes are the same, so are the arguments the same, except as the particular circumstances of appellee's case may be thought to have a bearing on the disposition of his litigation. We discuss here only those particular circumstances.

A. Appellee's Voluntary Acts

The record makes clear, as the court below found (R. 36), that appellee voluntarily absented himself from the United States, after receiving several notices from his draft board to report for pre-induction physical examinations and for induction, for the purpose of evading and avoiding military service. He may have initially left the United States for other purposes, but his subsequent behavior shows that he continued to remain abroad for the very purpose referred to in Section 349(a)(10), and that he was deliberately separating himself from his obligations as a citizen.

As early as 1951, appellee refused to accede to the requests of the American Embassy in London that he call at the Embassy with his passport (R. 72-74). The following year, after pursuing an offer of employment in the United States to the point of determining the date on which he would begin his duties in this country, he abandoned his planned return upon learning that he would be required to meet his obligations to the Selective Service System upon his return (R. 131-141). See the Statement, *supra*, pp. 7-10.

Despite the fact that appellee was not required to come to the United States, but was given the option of going to Frankfurt, Germany, for his pre-induction physical examination, he ignored the notices from his draft board to report for a physical examination. See *supra*, pp. 9-10. Any significance which might otherwise be attached to appellee's assertions that he believed himself physically unfit for military service is wholly neutralized by his failure to report for a physi-

cal examination which would have ascertained the facts."[36]

When the government of Great Britain refused to renew appellee's residence permit because of his failure to respond to the induction order of the United States government, he did not attempt to return to this country, but went instead to Czechoslovakia in 1954. Although his passport expired in 1952, he made no effort at that time to obtain a new one. He was admitted to and remained in Czechoslovakia for five years without an American passport (R. 77, 95). At no time between 1954, when he took up residence in Czechoslovakia, and 1959, did he seek to return to the United States or to secure a valid passport."[37] That he was aware that his conduct had extinguished his United States nationality is shown by the fact that the residence permit issued to him in 1954, at Prague, showed him to be stateless (R. 87); and further evidence of his voluntary decision to shun his responsibilities as a United States national is his statement that he took "political asylum" in Czechoslovakia (R. 98)."[38]

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[36] Findings that appellee was unfit for military service were made in connection with his original status as a regular registrant. Physical requirements for persons called under the doctors' draft were not as stringent as those set for regular service.

[37] Appellee claims that he made no attempt to return to the United States because of the illness of his wife (R. 95). This does not explain his failure between 1952 and 1959, seven years, to secure a passport for travel when his wife's health improved, as it did, since she traveled to the United States alone in 1959.

[38] It is interesting to note that, under the nationality laws of Czechoslovakia, the Ministry of Interior "may withdraw Czechoslovak State citizenship from a person resident abroad if that person (a) Has acted or is acting in a manner hostile to the State or likely to prejudice its interests, or . . . (c) Fails to return to the country within the prescribed time-limit of not less than thirty days

B. Lack of Alternative Citizenship

Unlike Mendoza-Martinez, appellee did not possess dual nationality when he lost his American citizenship. However, we do not believe that this factor affects the power of the United States, at least under the circumstances here, to divest appellee of his United States nationality.

1. We point out in our brief in No. 19 (pp. 35-37, 40-41, 62-63) that the problem presented to Congress in 1944 appeared largely to involve draft evasion by dual-nationals of Mexico and the United States. See H. Rep. No. 1229, 78th Cong., 2d Sess., pp. 2-3; 90 Cong. Rec. 3261-2. Those individuals would retain their foreign nationality if they lost their American citizenship, and as to them there would be no problems of statelessness. But Congress had scope in legislating; it was not required to restrict the statute precisely to the dual-national category, but could cover other instances of flight (to avoid the draft) having the same consequences for the United States. Cf. *Perez* v. *Brownell*, 356 U.S. 44, 59-60. The fact that in some cases the individual might become stateless would not destroy Congress's right to enact a general statute providing for expatriation of draft-evaders who leave the country.

2. Release of nationals from their allegiance, without acquisition of a new nationality, is by no means a unique phenomenon. See United Nations Secretariat,

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(if overseas ninety days) from the date on which he receives a summons to return from the Ministry of the Interior." Act No. 194 of 13 July 1949, Concerning the Acquisition and Loss of Czechoslovak State Citizenship, Article 7, United Nations Secretariat, Legal Department, *Laws Concerning Nationality* (1954), pp. 116, 118. Thus appellee, had he been a Czechoslovak citizen, could have been denationalized for his failure to respond to induction orders.

Department of Social Affairs, *A Study of Statelessness*, 139 (1949). Early in the history of this country it was recognized that it was possible for an individual to lose the nationality of his birth without simultaneously acquiring another. In *Caignet* v. *Pettit*, 2 Dall. 234, it was held that a native of France who had not been naturalized conformably to the terms of the then new United States Constitution was no longer a citizen of France.[20] The court said at p. 235:

> We are clearly of opinion . . . that the plaintiff was not . . . a citizen of France. It is true, that he has not acquired the rights of citizenship here: nor, as it appears, in any other country: but, whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution: and, as a member of the minority, to refuse allegiance to the new government, and withdraw from the territory of France. Everything that could be said or done to manifest such a determination, has been said and done by the plaintiff, except the act of becoming the subject or citizen of another country.

See also *Ex Parte Griffin*, 237 Fed. 445, 450 (N.D. N.Y.).

In more modern times, statelessness has been the possible result of various acts of expatriation. Under the Citizenship Act of 1907, 34 Stat. 1228, loss of American nationality followed upon the taking of an oath of allegiance to a foreign state even though citizenship in that state was not acquired (*cf. Savorgnan* v. *United States*, 338 U.S. 491). Under the Nationality Act of 1940, 54 Stat. 1137, the same could be true of tak-

[20] He had taken an oath of allegiance to the State of Pennsylvania under a statute which was at the time no longer in effect.

ing a foreign oath of allegiance, voting in a foreign election (cf. *Perez* v. *Brownell*, 356 U.S. 44), renouncing American nationality here or abroad, or committing treason. None of these acts of expatriation was tied to acquisition or possession of another nationality, and thousands of Americans lost their citizenship (especially through voting in foreign elections, or taking oaths of allegiance while serving in foreign armies) without having any other citizenship. The Immigration and Nationality Act of 1952 continues these provisions of the 1940 Act, and adds service in the armed forces of another country (cf. *Federici* v. *Miller*, 99 F. Supp. 962 (W.D. Pa.) and serving in a foreign government (cf. *Elizarraraz* v. *Brownell*, 217 F.2d 829 (C.A. 9)). Appellee's situation is no graver than that of other persons whose conduct may bring them under these other provisions of the 1952 Act.

3. The primary basis for concern about denationalization is the possibility that absence of nationality will result in depriving the individual of the protection of a state. See Weis, *Nationality and Statelessness in International Law*, 55-56, 121-138, 167-172 (1956). But such protection is a right given by the state which cannot be compelled by a citizen who by his own serious voluntary acts chooses the condition of statelessness. See 5 Hackworth, *Digest of International Law*, §§ 541, 542 (1943), 2 Lauterpacht's Oppenheim, *International Law*, 56-57 (7th ed. 1952). Appellee, therefore, has no basis for complaint. He did everything short of becoming a citizen of another country to show that he did not consider himself bound to his obligations as a United States national. Apparently, he traveled to Czechoslovakia and obtained residence there not as a United States national, but as a stateless person (R.

87). He voluntarily elected to act in such a way as to divest himself of his United States nationality without securing another.

Moreover, appellee has been admitted to Czechoslovakia, and there is no indication that Czechoslovakia intends to expel him.[20] His problems of absence of nationality are more apparent than real. He has voluntarily chosen the country in which he is now residing and working, and he has lived and worked there for seven years. At the present time he appears to meet the basic requirements for Czechoslovakian naturalization, should he choose to acquire that nationality.[21] In short, appellee has established a new domicile and there

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[20] The application for a United States passport indicates that appellee's residence permit was valid until October 22, 1959 (R. 87). It is not known whether a new permit has been issued.

Appellee's status in the event there should be an effort to expel him is a matter to be resolved by international law. Should this country decline to admit appellee, Czechoslovakia would have no basis for complaint since that country admitted appellee without a valid passport, and accepted him for residence as a stateless person —facts which put Czechoslovakia on notice at the time of admission that appellee's status as a United States national was, at the very least, open to question.

[21] Act No. 194 of 13 July 1949, Concerning the Acquistion and Loss of Czechoslovak State Citizenship (United Nations Secretariat, Legal Department, *Laws Concerning Nationality*, pp. 116-117 (1954)), provides in part:

Part I. Acquisition of Czechoslovak State Citizenship

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Article 3. By grant. (1) The Ministry of the Interior shall grant Czechoslovak State citizenship to applicants who:

(a) Have not committed an offence against the Czechoslovak Republic or its people's democratic regime, and

(b) Have lived in Czechoslovak territory continuously for at least five years, and

(c) On acquiring Czechoslovak State citizenship renounce, unless stateless, their previous national allegiance . . . .

is no reason to infer that his position is any different from, or more troublesome than, that of any other voluntary émigré.

4. Finally, it is pertinent to note that the rigors of absence of nationality which give rise to concern for the status of those who are stateless are in the process of continual mitigation through the adoption of international conventions to protect the rights of individuals without regard to their *de jure* nationality status. See Van Panhuys, *The Role of Nationality in International Law,* 223-227 (1959); United Nations Secretariat, Department of Social Affairs, *A Study of Statelessness* (1949); Robinson, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation* (1955). Statelessness presents problems to be solved by the political branches of the federal government, if they can and desire to do so. These are not problems for the courts to cure by invalidating general Congressional legislation because it can lead in some circumstances to statelessness. The undesirability of that status has not attained the level of a constitutional principle to be imposed on Congress by this Court.

CONCLUSION

If the Court agrees with the government's view, discussed in Point I, *supra,* that the district court was without jurisdiction of this case under Section 360(b) and (c) of the Immigration and Nationality Act of 1952, the judgment below should be reversed and the cause remanded with directions to dismiss the complaint for lack of jurisdiction. If the Court believes that the district court did have jurisdiction of the cause, then, for the reasons set forth in Point II, *supra,* and in our brief in *Kennedy* v. *Mendoza-Martinez,* No.

19, it is respectfully submitted that the judgment below should be reversed and the case remanded to the district court with directions to grant judgment for the appellant.

Respectfully submitted,

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AUGUST 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE 1961—604116/P. O. 188